89-1234

Supreme Court, U.S.
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CASE NO.

In the Supreme Court of the United States

October Term, 1989

LEONARD A. PELULLO

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

BARRY RICHARD
ROBERTS, BAGGETT,
LAFACE & RICHARD
101 E. COLLEGE AVENUE
TALLAHASSEE, FLORIDA 32302
(904) 222-6891

QUESTION PRESENTED FOR REVIEW

Whether motion to dismiss indictment premised on prosecutorial misconduct during grand jury investigation presented defect in indictment so fundamental to defendant's constitutional rights as to justify interlocutory review of the District Court finding that it was without power to dismiss the indictment prior to arraignment.

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ORDER BELOW

The United States Court of Appeals for the Sixth Circuit dismissed an interlocutory appeal of a district court order denying Petitioner's motion to dismiss indictment and thereafter denied his petition for rehearing. The orders of the Sixth Circuit and the District Court are reprinted in the Appendix hereto. The Sixth Circuit opinion is unpublished. 886 F.2d 330 (1989) (Table).

JURISDICTION

This Petition arises from an indictment filed in the District Court for the Southern District of Ohio (Western Division). The District Court denied defendant's motion to dismiss the indictment. Defendant appealed the dismissal to the United States Court of Appeals for the Sixth Circuit pursuant to jurisdiction vested therein by 28 U.S.C. Section 1291, and the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

On September 28, 1989, the Court of Appeals entered an order dismissing the appeal for lack of jurisdiction. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. Section 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Section 1291

The courts of appeal (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CASE NO.

In the Supreme Court of the United States

October Term, 1989

LEONARD A. PELULLO[1]

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

The Petitioner, Leonard A. Pelullo ("PELULLO"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

[1]PELULLO and the government were the only parties to the appeal below. The only other defendant named in the indictment was David A. Friedmann.

STATEMENT OF THE FACTS AND CASE

Petitioner submits the following statement of the case which sets forth the course of the proceedings in the courts below and the facts material to the questions presented.

PELULLO is an officer and director of two publicly held corporations, and is associated with a takeover attempt of a third publicly held corporation. Co-defendant David A. Friedmann ("Friedmann") was the sole stockholder of Savings One Association, a Savings and Loan institution. PELULLO is charged, in part, with paying a bribe of $145,000 to Friedmann to facilitate a loan to a corporation of which PELULLO was associated.

During the course of the grand jury investigation, PELULLO's counsel provided the government with evidence that the $145,000 was not a bribe, but instead represented prepaid interest. Counsel further informed the government that PELULLO would be willing to testify before the grand jury. In particular, the government was informed of, and PELULLO would have testified to, the following facts. (R.3; R.6).

The company PELULLO was associated with borrowed one million dollars from Savings One Association. The loan was closed for the bank by the law firm of Aronoff, Rosen & Stockdale, corporate counsel to the bank and personal counsel to Friedmann. Immediately after the loan closing, PELULLO entered into negotiations with Friedmann to extend and increase that loan and a loan to a related company. Friedmann demanded $250,000 in prepaid interest for Savings One Association. They ultimately agreed upon

$145,000 for Savings One Association as prepaid interest.

Due to previous misrepresentations by Friedmann and officers of Savings One, PELULLO did not trust the bank to hold the $145,000. He did, however, trust Senator Aronoff (a member of the Aronoff, Rosen & Stockdale firm and president of the Ohio State Senate) who had acted as mediator and peacemaker between PELULLO and Friedmann in the past. PELULLO and Friedmann agreed that the money would be held in the trust account of Aronoff, Rosen & Stockdale.

Several days after the loan proceeds were disbursed, PELULLO's prior counsel wire transferred $145,000 to an account entitled "Aronoff, Rosen & Stockdale Trust Account No. 9743683." A member of the Aronoff firm supplied this account number to PELULLO's attorney. Unknown to PELULLO or his attorney, that account was not an attorney's trust account, but instead was an account held by the law firm for Friedmann.

Savings One subsequently refused to sign the documents to extend the loans. PELULLO's attorney contacted Senator Aronoff's firm and demanded the return of the money. (This conversation was memorialized by a letter from Senator Aronoff's law firm.) However, Friedmann, having access to the money, had removed the $145,000 from the account. Thereafter, Senator Aronoff, Friedmann and PELULLO had a conference call wherein an irate PELULLO demanded the return of the $145,000 and stated that the corporation would pay interest in the normal fashion. (This conversation is reflected by notes of Senator Aronoff.) Since Savings One had not approved the

extension, PELULLO wanted to follow the terms of the existing loan documents.

Friedmann refused to return the money. PELULLO then caused suit to be filed in federal court against Savings One and Friedmann for return of the $145,000 in prepaid interest. This suit was filed four years prior to any investigation by any government agency.

Notwithstanding the government's knowledge of these facts, and of PELULLO's willingness to testify before the grand jury, the government did not call PELULLO to testify. Nor did the government call Senator Aronoff to testify, who, as noted by the judge, "could throw light on the situation." (App. p. 13). Instead the government called Senator Aronoff's law partner, who did not participate in the exculpatory discussions. This partner was called to produce various loan documents, but was not asked about any of the exculpatory documents of which counsel had informed the prosecutor, such as the pleadings of the lawsuit against Savings One and Friedmann, Aronoff's notes, or the letter from the Aronoff firm. These documents were *never produced* to the grand jury. The government thus denied the grand jury the availability of exculpatory evidence, and relied, instead, on what, as admitted by the prosecutor to the judge, amounted to "very limited Jencks material" — which can only be construed as hearsay. (R.7:30).

The prosecutor, who had let four years and eleven months pass regarding this matter, stampeded the grand jury into indicting the defendants one month before the Statute of Limitations expired by ignoring all the exculpatory evidence, denying the defendant the right to testify and presenting primarily hearsay evidence.

On June 21, 1989, the federal grand jury in the Southern District of Ohio returned an indictment against PELULLO and his co-defendant, Friedmann. The indictment alleges that the defendants were involved in a scheme to defraud a Savings & Loan institution, which scheme included payments by PELULLO of bribes or "kickbacks" to Friedmann for the purpose of facilitating loans to corporations with which PELULLO was associated. The defendants were charged with four counts of wire fraud in violation of 18 U.S.C. Sections 1343 and 2, and one count of conspiracy to commit wire fraud in violation of 18 U.S.C. Section 371.

On July 14, 1989, prior to the arraignment, PELULLO moved to dismiss the indictment on the basis of prosecutorial misconduct. The District Court held a hearing in chambers on August 4, 1989. The Court, in denying PELULLO's motion, stated as follows:

> Viewing the situation as it's been presented, it is my judgment that I am instructed by the Sixth Circuit to proceed to the arraignment, that to have, to raise the issue of prosecutorial misconduct its necessary that I have the issues framed which means that a plea should be entered, guilty, not guilty, nolo contendre. If, and in the event this Court grants a Rule 29 motion, either at the end of the government's case or at the end of all the evidence prosecutorial misconduct will be presumed and with whatever ramifications that may have on the proceedings.

> . . . it is my intent that the rulings of this Court, whether they are mere matters of ruling on an evidentiary question or whether it's something that magnitudes such as the ruling I am making now are absolutely appealable. (Appendix[2] p. 15).

Immediately after the hearing, PELULLO filed a Notice of Appeal. The Sixth Circuit dismissed the Appeal for lack of jurisdiction on September 28, 1989. On October 12, 1989, PELULLO filed a petition for rehearing and requested the Sixth Circuit to include in its mandate a statement that the District Court had the discretion to decide the motion to dismiss the indictment prior to arraignment. The Sixth Circuit denied PELULLO's petition on December 22, 1989.

On December 29, 1989, PELULLO moved to stay the mandate pending this Petition for Writ of Certiorari. The Sixth Circuit, by order dated January 9, 1990, agreed to stay issuance of the mandate until February 1, 1990.

REASONS FOR ALLOWANCE OF WRIT

This Court should grant this Petition because: (a) Petitioner's case presents issues related to federal principles of overriding importance which have not been, but should be, settled by this Court; and (b) the Sixth Circuit Court of Appeals has sanctioned a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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[2]Relevant portions of the hearing transcript are reprinted in the Appendix hereto.

ARGUMENT

The motion to dismiss indictment premised on prosecutorial misconduct during grand jury investigation presented defect in indictment so fundamental to defendant's constitutional rights as to justify interlocutory review of the district court finding that it was without power to dismiss the indictment prior to arraignment.

Inclusion of the right to grand jury in the Constitution reflects a recognition by the drafters that the burden of standing trial is itself so onerous that the right to jury trial alone is insufficient to protect against prosecutorial abuse. The Petitioner has been denied his fundamental right to a bona fide grand jury review by a combination of erroneous decisions by the district and circuit courts concluding on procedural grounds that they were without power to consider the issue before trial. The impact on Petitioner's fundamental rights of denying such review prior to arraignment would be irreparable.

In *Hughes v. Thompson*, 415 U.S. 1301 (1974), Justice Douglas, sitting as a circuit court justice, held that a district court has the power to rule on a motion to dismiss an indictment prior to arraignment. 415 U.S. at 1302. Whether the district court exercises that power lies within its discretion. *Id.* Nevertheless, the district court below, while recognizing the possible existence of prosecutorial abuse, concluded that it was without power to review the matter prior to arraignment.

The Sixth Circuit refused to accept jurisdiction on the ground that there was no basis for interlocutory appeal. It is generally true that under 28 U.S.C. § 1291, only final orders are appealable. In criminal cases

review is generally permissible only after conviction and sentence. *Flanagan v. United States*, 465 U.S. 259, 263 (1984). However, the "collateral order" doctrine, established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is an exception to that rule. Under that doctrine, final collateral order may be reviewed on appeal if it meets the following criteria:

> [T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

In *Midland Asphalt Corp. v. U.S.*, __U.S.__, 109 S.Ct. 1494 (1989), defendants moved to dismiss indictments against them for improper disclosure of grand jury materials by the government in violation of Rule 6(e)(2), Federal Rules of Criminal Procedure. The District Court denied the motion. The Second Circuit dismissed the appeal. This Court granted certiorari and held that the District Court's order was not immediately appealable as a collateral order because the order failed to meet one or the other of the last two prongs of the *Coopers & Lybrand* test.

Under *Midland Asphalt,* however, if the defect in the indictment or grand jury proceedings "is so fundamental that the grand jury ceases to be a grand jury or the indictment ceases to be an indictment", then the defect gives rise to the defendant's Fifth Amendment right not to be tried. __U.S. at __; 109 S.Ct. at 1499-1500. All three prongs of the *Coopers & Lybrand* test are satisfied. An order denying a motion to dismiss is immediately appealable.

The prosecutorial misconduct in the case *sub judice* was such that the grand jury was eviscerated of one of its most essential purposes. The office of the grand jury "is to provide a shield against arbitrary or oppressive action." *United States v. Mandujano*, 425 U.S. 564, 571 (1976). Its "mission is to clear the innocent, no less than to bring to trial those who may be guilty." *U.S. v. Dionisio*, 410 U.S. 1, 16-17 (1973). The government made it impossible for the grand jury to act as a "shield" by suppressing substantial exculpatory evidence which might have led the grand jury not to indict, *United States v. Ciambrone*, 601 F.2d 616, 623 (2nd Cir. 1979); refusing to allow the defendant to testify; and presenting extensive hearsay evidence, *Cf. United States v. Hogan*, 712 F.2d 757 (2nd Cir. 1983). The grand jury, stripped of its true purpose, became merely the hand by which the prosecutor penned the indictment.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

BARRY RICHARD
ROBERTS, BAGGETT,
LAFACE & RICHARD
101 E. College Avenue
Tallahassee, Florida 32302
(904) 222-6891

Attorneys for Petitioner
Leonard A. Pelullo

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 1st day of February, 1990 upon:

John M. Dipuccio
Assistant U.S. Attorney
220 U.S. Post Office/Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202

Solicitor General
Department of Justice
Washington, D.C. 20530

Barry Richard

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3728

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

LEONARD A. PELULLO,

Defendants-Appellant.

Before: MERRITT and RYAN, Circuit Judges; and PECK, Senior Circuit Judge.

The defendant appeals the order denying his motion to stay the arraignment and dismiss the indictment. The government now moves to dismiss on the grounds that the order is not a final, appealable order pursuant to 28 U.S.C. § 1291. The defendant opposes the motion and requests that the motion be referred to the panel assigned to hear the appeal on its merits.

The indictment was returned on June 21, 1989. The defendant was charged with conspiracy to defraud the United States and fraud by wire. The defendant subsequently filed an emergency motion to stay the arraignment and dismiss the indictment on grounds of prosecutorial misconduct. The defendant alleges that the prosecutor acted improperly by failing to present

exculpatory evidence to the grand jury, by failing to permit the defendant to testify before the grand jury, and by providing almost entirely hearsay evidence to the grand jury. The district court denied the defendant's motion without prejudice; the court stated that it would review the issue of prosecutorial misconduct either at the conclusion of the government's case or at the conclusion of the entire case. The defendant filed a notice of appeal to this Court.

The government asserts that such an order is interlocutory and does not fall within the collateral order exception to the finality rule set forth in *Coopers & Lybrand v. Livesay*, 437 U.S. 475 (1978).

The defendant argues that *United States v. Mechanik*, 475 U.S. 66 (1986) (petit jury's guilty verdict rendered harmless any grand jury error flowing from a Fed. R. Crim. P. 6(d) violation) created an additional exception to the final judgment rules. The defendant argues that under *Mechanik*, unless he is permitted immediate appeal of the district court's order he will otherwise be precluded from challenging the alleged defects in the grand jury proceedings.

The finality rule embodied in 28 U.S.C. § 1291 limits the jurisdiction of appellate courts to appeals from all final decisions of the federal district courts. In criminal cases, the final decision of the district court is the conviction and sentence. *Flanagan v. United States*, 465 U.S. 259, 263 (1984).

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court created the

collateral order doctrine as a narrow exception to the finality rule. To fall within the limited class of final collateral orders, an order must 1) "conclusively determine the disputed question"; 2) "resolve an important issue completely separate from the merits of the action"; and 3) "be effectively unreviewable on appeal from final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. at 468.

In *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam), the Supreme Court listed three types of criminal interlocutory appeals which the Court had previously decided fell within the collateral order exception of the finality rule: 1) an order denying a motion to reduce bail (*Stack v. Boyle*, 342 U.S. 1 (1951)); 2) an order denying a pre-trial motion to dismiss an indictment on double jeopardy grounds (*Abney v. United States*, 431 U.S. 651 (1977)); and 3) an order denying a member of Congress immunity conferred by the Speech or Debate Clause of the Constitution (*Helstoski v. Meanor*, 442 U.S. 500 (1979)). *Id.* at 266. The Court determined that the order in *Hollywood* denying the motion to dismiss the indictment based on prosecutorial vindictiveness was not analogous to the above exceptions; it did not pertain to a right which must be upheld prior to trial if it is to be enjoyed at all. *Id.* at 270. Therefore, the Court concluded that the appeal should not be dismissed. The claim failed the third prong of the collateral order doctrine test since it was not effectively unreviewable on appeal. *Id.* at 267.

The Supreme Court recently held that an order denying a motion to dismiss an indictment for violations of Fed. R. Crim. P. 6(e)(2) was not immediately

appealable. *Midland Asphalt Corp. v. United States*, 109 S.Ct. 1494, 1497 (1989). The Court determined that *Mechanik* did not confer jurisdiction on the court of appeals to review the interlocutory order in *Midland*. *Id.* at 1498. The alleged violation of Rule 6(e) did not give rise to the right not to stand trial, therefore the order denying the defendant's motion was reviewable following final judgment. *Id.* at 1499.

We conclude that we lack jurisdiction in this appeal. The order appealed by the defendant is interlocutory and may be reviewed by this Court on appeal from the final judgment. The *Mechanik* decision does not confer jurisdiction upon the Court in this appeal.

It is therefore ORDERED that the motion to dismiss is granted.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3728

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEONARD A. PELULLO,

Defendant-Appellant.

ORDER

Before: MERRITT, Chief Judge; RYAN, Circuit Judge; and PECK, Senior Circuit Judge.

Defendant Leonard A. Pelullo moves the Court to reconsider the order of September 28, 1989 dismissing this appeal for lack of appellate jurisdiction. Upon consideration of this matter, we conclude that the defendant has cited no misapprehension of law or fact which warrants a reconsideration. Fed. R. App. P. 40(a). The motion to reconsider is denied.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CR-1-89-63-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEONARD A. PELULLO,

Defendant.

ORDER

Pursuant to Fed. Rule Crim. P. 6(e)(5), a hearing was held in this matter on August 4, 1989. The Court DENIED defendant Pelullo's Motion to Stay Arraignment and Dismiss indictment (doc. no. 3). Defendant Pelullo thereupon filed a Notice of Appeal (doc. no. 9) appealing that Order.

The Court therefore lacks jurisdiction to proceed in this case. Accordingly, the arraignment of this defendant scheduled for this date is hereby CONTINUED indefinitely.

Pursuant to Fed. R. Crim. P. 6(e)(6), the Motion, memorandum and transcript of hearing in this proceeding are hereby SEALED and ORDERED

transmitted to the United States Court of Appeals for the Sixth Circuit.

IT IS SO ORDERED.

By: /s/ Herman J. Weber

Herman J. Weber, Judge
United States District Court

Portions of Transcript of Hearing
Held in Chambers on August 4, 1989

THE COURT: All right. Now I have had an opportunity to investigate the instructions to this Court from the Sixth Circuit. And the Court has studied United States of America versus Adrian J. Short. It's 671 Federal Reporter Second, 178, decided in 1982. The Court has considered United States of America versus Thomas D. Powell, it's cited as 823 Federal Reporter Second series, and it's 996. The Court has considered Costello versus the United States, it's cited as 359 United States — no, that's not right. 350 United States, and the page citation is 359. The Court has also considered Long versus the United States which is a Sixth Circuit case — well, no, wait a minute. It's a Second Circuit case, but since it is outside the Sixth Circuit, I feel I am bound by the Sixth Circuit cases.

And another case that the Court has considered is Dennis versus United States, it's 3 — it's 384 US, I guess that was the Supreme Court case, excuse me. Yes. The Long versus United States is 355 United States 339, and it is a Supreme Court case, so I am bound by it. And another case is 384 United States, Dennis versus United States, and it's 85 — 384 US 855.

Now in that frame work I have considered the paper that I have. And as I have already explained into the record, I have not considered the specific testimony that was presented to the Grand Jury. But based upon United States versus Short primarily, 671 Fed Second, this Court is burdened by the sentencing guidelines. This Court has been, is responsible to try criminal cases

within 70 days. It's difficult for this Court to find that until an arraignment is held that a defendant has any standing to raise the deficiency of an indictment that is regular on its face. The defendant, of course, has a right and the obligation to raise the issues of the makeup of the Grand Jury, that it violated racial, religious, sex concerns, and they have an obligation to raise the issue of bias. No question about it. The Court believes that the issue of bias that has been raised is a result of the, this building and loan or savings and loan situation, and this Court does not believe that it raises, or rises to the level of a particularized need to investigate the transcript of the Grand Jury or to further investigate this matter prior to the arraignment.

This Court further believes that prosecutorial misconduct, if it exists in this case, will be severely dealt with. But the appropriate time to deal with that is after the arraignment and after, and probably after at least the presentation is made by the government of its case in chief. Assuming that this Court would grant a Rule 29 motion of acquittal, then this Court will presume there is prosecutorial misconduct and will proceed accordingly in that regard by going into the Grand Jury proccedings, going into the Grand Jury transcript, and going into the other aspects. The Court can only know that after the case in chief has been presented. Further, the Court sees this proceedings [sic] —

[BRIEF INTERRUPTION]

THE COURT: That's all right. I'm giving you a $10 speech and now I forgot where I was. But anyway, the prosecutorial misconduct would only be properly

evaluated after the arraignment and either in motions to dismiss or in, to my mind, after the case in chief has been presented. I know in this case that defense is not attempting to avoid the Jinx [sic] Act because the witnesses, I'm sure, are reasonably well known to the defense. So that this is not a case where I feel that this is an attempt to avoid the impact of the Jinx [sic] Act and the Jinx [sic] Act materials. However, this Court personally disagrees with the Jinx [sic] Act. I find the Jinx [sic] Act an impediment to the speedy trial statute, I find the Jinx [sic] Act an impediment to the sentencing process, and I find that the Jinx [sic] Act is an impediment to the swift and speedy conclusion of a criminal case. But I am bound by the Jinx [sic] Act and the congressional history behind it, and I am bound by the Sixth Circuit and the Supreme Court's interpretation of that act. And therefore, it is my duty to follow and maintain the Jinx [sic] Act.

If I put the stamp of approval on this type of a proceeding absent a, being clearly and unequivocally convinced that it is necessary for me to interfere with the Grand Jury process, unless I am clearly convinced of that, then the precedent that I am setting is a spector that I just cannot accept and would find that it would be, it would violate the Jinx [sic] Act approach, it would violate due process as due process relates to the United States, and would be an abomination as far as administration of the docket of this Court and the criminal justice responsibilities that I have with this Court.

Now, Mr. DiPuccio you are going to have to justify what I am doing in this case. Are there any other

statements you wish me to make of the record, any findings you wish me to make, anything else you wish me to state for the record at this time before I make, I mean the conclusion that I intend to make in this case which is that we are going to proceed with the arraignment this morning.

MR. DiPUCCIO: No, Your Honor.

THE COURT: And anything you wish me to put into the record or comment on or draw to my attention? And I am assuming, I mean, I am assuming the information you have given me is accurate.

MR. SCHWARTZ: Your Honor, there's some additional information.

THE COURT: And you can put that on the record at this time.

MR. SCHWARTZ: The information that we learned subsequent to the filing of our papers. In Your Honor's —

THE COURT: And the reason I am talking in a soft voice is that from our point of view — we are sitting out in the hall now — there is no sound barrier between this office and the hall. And as you have already pointed out, the press is interested in your case.

MR. SCHWARTZ: And because of the press's interest in our case, Senator Aronoff contacted Ms. Dlott subsequent to a series of articles that appeared over the last weekend in the newspaper and some of the things

that Senator, I thought we were going to investigate — some of the things Senator Aronoff told Ms. Mr. [sic] Dlott were things that we had not brought out from Senator Aronoff. For instance, one of the things we found particularly troubling, and all three of the defense team have had experience on the prosecutorial level, was Senator Aronoff told Ms. Dlott that just before the returning of the indictment he was contacted, or his office was contacted by the US Attorney's office and told that — well, let me get Ms. Dlott to give you the exact words because I don't want to misrepresent.

MS. DLOTT: I will read from my notes, Your Honor, so I won't misrepresent. Senator Aronoff told me that the US Attorney's office had called their office prior to filing the indictment to say that there would be no mention of the Aronoff law firm in the indictment because the US Attorney's office had come to the conclusion that the Aronoff firm did nothing wrong and they didn't want to implicate them.

MR. SCHWARTZ: Now I don't understand the US Attorney's office doing that. That seems out of the ordinary course of proceedings to me. And it's troubling when taken in conjunction with the fact that Senator Aronoff has consistently said that he was never interviewed regarding this matter, never went before the Grand Jury, and he was one of the crucial witnesses who we felt provided excuplatory evidence. I don't know the interplay there. I don't know the rationale for that. And that is somewhat troubling in light of the presentation we have made to this Court.

MR. DiPUCCIO: Your Honor, may I ask a question?

THE COURT: Yes, certainly.

MR. DiPUCCIO: The US Attorney's office, I mean, is that the receptionist, is that the guy that cleans the hallways, is it me, is it my secretary, is it the US Attorney? I mean, who do you mean by the US Attorney's office? Did he say who he talked to?

MS. DLOTT: No, he told me the US Attorney's office.

THE COURT: And my problem with that -- and really as I reviewed this problem I did accept the fact that Senator Aronoff could throw light on the situation. I accepted that. But I note in the information that a member of his law firm did appear before the Grand Jury and did give information. That is in the paperwork that is before me.

MR. SCHWARTZ: I don't know if it was before the Grand Jury or if he was interviewed, but I did provide information regarding the loans, not regarding the other information.

THE COURT: Well, you see, so that the law firm did provide or had input into the situation. And as Judge Lively has pointed out, and whom I respect greatly, said that the criminal justice system cannot take on the added burden of trying a criminal case twice is how I read his instructions to me, and that means before arraignment. And to me, I understand the, in fact, I am

closely related to the situation now, it's high publicity, where a person that is accused is not afforded the constitutional protection that was so definitely written into the institution in our institution [sic]. I understand that. But I cannot be responsible to change the morals of the universe. I can only be responsible to administer a criminal docket and a criminal case. *And it is my belief, absent a constitutional challenge to the Grand Jury on the basis of race, creed, color, and national origin, absent a clear showing of bias that the issue of, to have standing, to raise the issue of prosecutorial misconduct which is what is being raised here is, requires at least an issue. Right now I haven't even an issue until there is a plea to that indictment. Then I have an issue. And then I can proceed to try it pursuant to the judicial process which we are all familiar with.* [Emphasis Added]

* * * *

THE COURT: I would be more than — you have a right to appeal everything I do. You have an obligation to protect your client. If you feel you have a right to an interlocutory decree or an interlocutory appeal, you have the obligation to attempt to get the Sixth Circuit to give you an interlocutory decree. I have considered the problem and as I tried to point out in this record that the issue of prosecutorial misconduct can become an issue of appealability, in my opinion, at the stages in the proceeding when this Court must view the Rule 29 motion.

At the end of the government's case, there is a Rule 29 posture. At the end of the entire case there is another Rule 29 posture. And I guarantee you that if this Court in this case determines that a Rule 29 motion should

be given in favor of the defendant, either end, the prosecutorial misconduct would be presumed as I said. Now as I understand the case you just cited to me it's only when a jury determines it do you lose your right to appeal.

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THE COURT: . . . Now I haven't ruled yet. I find there is no particularized need for me to view the Grand Jury transcript at this time although it will be available and sealed. *Viewing the situation as it's been presented, it is my judgment that I am instructed by the Sixth Circuit to proceed to the arraignment, that to have, to raise the issue of prosecutorial misconduct it's necessary that I have the issues framed which means that a plea should be entered, guilty, not guilty, nolo contendre. If, and in the event this Court grants a Rule 29 motion, either at the end of the government's case or at the end of all the evidence prosecutorial misconduct will be presumed and with whatever ramifications that may have on the proceedings.*

If the case goes to a jury trial, the Court would intend to follow the Sixth Circuit rather than the Ninth Circuit, and it is my intent that the rulings of this Court, whether they are mere matters of ruling on an evidentiary question or whether it's something that *magnitudes such as the ruling I am making now are absolutely appealable.* And I take great comfort in that. Because, you see, a trial judge has a luxury. A trial judge cannot make any mistakes. The Court of Appeals will

correct them all. So I am, quote, infallible. I cannot make any mistakes. So I sleep like a baby. How about that? *So it is my judgment that the motion to dismiss this indictment without prejudice would be denied at this time.* This record will be sealed. The transcript will be sealed, and I seal it under the authority of Rule 6, the Criminal Rules of Civil Procedure. Next round. [Emphasis Added]